FILED

DEC 29 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-774

PAUL LEE SWEENY, Executor and Trustee under the will of GERVAIS JOSEPH SEWELL, Deceased,
Petitioner,

v.

GILBERT R. KNOWLTON, and BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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December 29, 1977

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JURISDICTION

Respondents submit that this Court lacks jurisdiction to review the subject decision of the Supreme Court of Virginia under Title 28, United States Code, Section 1257(3), as there is no federal constitutional issue nor any controlling federal question properly presented for consideration, as discussed in the Argument section, *infra,* at pages 7-10.

QUESTION PRESENTED

Whether jurisdiction to review lies where purported federal constitutional issues were raised for the first time in the petition to this Court for writ of certiorari, and where the decisions of the state courts were based exclusively on state grounds.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Respondents submit that the Fourteenth Amendment to the United States Constitution not only was not involved in the decisions of the courts below, but that no issue concerning the Fourteenth Amendment was ever raised below. The lower courts' decisions were, and this Court's review should be, limited to the following:

Va. Code § 15.1-11.1, Appendix *infra* at 13a.

Va. Code § 15.1-14(5), Appendix *infra* at 13a.

Va. Code § 15.1-491(d), Appendix *infra* at 13a-14a.

Va. Code § 15.1-499, Appendix *infra* at 14a.

Va. Code § 15.1-522, Appendix *infra* at 14a.

Va. Code § 15.1-867, Appendix *infra* at 14a.

Va. Code § 15.1-905, Appendix *infra* at 14a.

Va. Code § 21-89.6, Appendix *infra* at 15a.

Va. Code § 21-89.11, Appendix *infra* at 15a.

Fairfax County Code § 1A-9, Appendix *infra* at 15a-16a.

Fairfax County Code § 17-7.2, Appendix *infra* at at 16a-17a.

Fairfax County Code §§ 30-1.8.18 and 30-1.8.18.1, Appendix *infra* at 17a-18a.

Fairfax County Code §§ 30-2.2.1 and 2.2.2, Appendix *infra* at 18a-20a.

Fairfax County Code § 30-3.2.1.4.1, Appendix *infra* at 20a.

STATEMENT OF THE CASE[1]

In 1967, Gervais J. Sewell inherited approximately 17 acres of real property located at 2051 Great Falls Street in Fairfax County, Virginia. At that time the property was used for farming, as it had been since at least the 1920's. The land had been residentially zoned since the first adoption of a zoning ordinance in Fairfax County in 1941, and had been zoned in the RE-1 classification (Residential—one dwelling unit per acre) since 1959. The residential classification does not permit industrial or commercial uses of property so zoned, but farming was a nonconforming use of the land by right, as it predated adoption of the zoning ordinance. The area surrounding the Sewell property is developed residentially, with the exception of a parcel of park land to the rear of the property.

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[1] Preparation of a statement of the case was made difficult by the failure of Petitioner to file a complete transcript of the proceedings below. A copy of the order of the trial court certifying to the Supreme Court of Virginia that the transcript of the proceedings was incomplete appears in the Appendix *infra* at 9a-12a.

The order certifies that the transcript of the proceedings filed by Petitioner was deficient in the following respects: omission altogether of the testimony of thirty-five (35) of the forty-five (45) trial witnesses, incomplete transcriptions of the testimony of the other ten (10) witnesses, omission altogether of a transcription of the proceedings on the first day of trial, and omission of transcriptions of the proceedings at three pretrial hearings. Petitioner presents the same incomplete and defective record to this Court.

Sewell continued to farm the land after 1967, selling produce at stands in various locations, until the early 1970's, when his uses of the property changed dramatically.

Apparently acting upon the conviction that more profit could be made from uses of the property other than farming, Sewell scraped virtually all of the topsoil off the land into a stockpile (some 400,000 cubic yards by his own estimate), and began selling it for approximately $80.00 per load.

At approximately the same time, Sewell began operating a dump, or landfill, permitting the dumping of virtually any substance for a fee which varied from $5.00 to $25.00 per load according to the size of the dumping vehicle.[2] Sewell also began stockpiling leaves in an enormous heap on the rear portion of the property, for purposes of producing compost or leafmold, which he sold for up to $300.00 per load.[3]

Sewell had no permit to operate a dump or landfill or to remove or sell topsoil, and both uses were in continuing violation of the provisions of the Fairfax County Zoning Ordinance which govern uses of residentially zoned property. Sewell also had amassed a total of approximately 34 vehicles on the property, many of which were inoperable junk, and most of which were lined up along Great Falls Street at the front of the property.

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[2] The landfill operation was indeed profitable, grossing approximately $40,000 in 1975 and as much as $16,000 for the one-month period from mid-December, 1975, to mid-January, 1976, when the operation was temporarily enjoined.

[3] The leaves were deposited on Sewell's property at Sewell's request by leaf collection trucks operated by Fairfax County.

By late 1975, the residential community surrounding Sewell's property was feeling the full brunt of Sewell's new uses of his property. A leachate produced by the decomposition of leaves in the huge leaf pile was entering the stream running through Sewell's property, turning the stream black and befouling the air with a nauseating stench compared by testifying neighbors with that caused by excrement or decayed animal matter. Trucks were hauling in material to dump on Sewell's property or hauling out topsoil at the rate of 40 trucks per hour, dawn to dusk, creating havoc as they necessarily approached and left the Sewell property on residential streets.

On November 13, 1975, Gilbert R. Knowlton, Zoning Administrator of Fairfax County, Virginia, and the Board of Supervisors of Fairfax County, Virginia (hereinafter collectively referred to as "Fairfax County"), filed a Bill of Complaint for Declaratory Judgment and Injunctive Relief against Sewell in the Circuit Court of Fairfax County.

The bill of complaint alleged wholesale and continuing violations of Fairfax County ordinances and of statutes of the Commonwealth of Virginia, and sought, *inter alia,* injunctive relief from pollution of air and of state waters, and from illegal uses by Sewell of the subject property as a landfill or dump, and for storage of junk and junk vehicles. A subsequent amendment to the bill of complaint sought injunctive relief from illegal removal of topsoil from the property.

Following pretrial hearings, the Circuit Court issued orders temporarily enjoining Sewell (1) from permitting the emanation of air and water pollution

from his property and (2) from operating a landfill or dump on the property.

Trial was held on April 7, 12, 13, and 19, 1976. *Forty-three* (43) of Sewell's neighbors testified in Fairfax County's case, either in person, by affidavit, or by proffer (the latter category consisting of persons who were present and available to testify, but whose testimony was deemed to be cumulative to that of other witnesses.)

Sewell's neighbors testified to air and water pollution emanating from Sewell's property, to damage caused by trucks en route to or from Sewell's property including cracks in walls and ceilings of houses created by vibrations caused by the giant dumptrucks, to danger to children and to traffic problems created by the trucks. The neighbors further testified to unbearable noise caused by truck traffic, by the banging of the beds of dumptrucks emptying their loads, and by Sewell's earth-moving machinery working the dump.

Neighbors fronting the Sewell property testified to the noise and to the eyesore qualities both of the junk vehicles lined along Great Falls Street, and of the property itself as a result of the transformation from farm to dump. An adjoining neighbor testified to fires caused by spontaneous combustion in the leaf pile, and to rats attracted by rotten tomatoes collected by Sewell from his produce stands and dumped on his property.

During the trial, the Circuit Court made the temporary injunction against air and water pollution permanent. Following trial, the Circuit Court permanently enjoined operation of a landfill, topsoil removal or sale, and storage of junk vehicles. All four permanent injunctions were incorporated into the final order of the Circuit Court, which was filed on November 5, 1976, and which appears in the Appendix *infra* at 6a-8a.

Sewell died in January 1977. Paul Lee Sweeny, executor and trustee of Sewell's estate, filed a Petition for Appeal in March 1977 in the Supreme Court of Virginia. On June 23, 1977, stating that it was "of opinion that there is no reversible error in the decree appealed from," the Supreme Court of Virginia in a one-paragraph order rejected the petition, refused the appeal, and affirmed the decision of the Circuit Court.[4] A Petition for Rehearing filed by Sweeny likewise was summarily denied.[5] Sweeny subsequently filed in this Court a Petition for Writ of Certiorari to the Supreme Court of Virginia.

ARGUMENT

Jurisdiction to review does not lie where purported federal constitutional issues were raised for the first time in the petition for writ of certiorari, and where the decisions of the state courts were based exclusively on state grounds.

Petitioner founds his claim of jurisdiction of this Court to review the decisions of the Supreme Court of Virginia and of the Circuit Court of Fairfax County upon 28 U.S.C. § 1257(3)[6] alleging infringe-

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[4] Appendix *infra* at 2a.

[5] Appendix *infra* at 1a.

[6] Petition for Writ of Certiorari at 2.

28 U.S.C. § 1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

ment of rights to due process and to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner's contentions with regard to federal constitutional rights are made for the first time in the petition for writ of certiorari. No constitutional issues of any kind were raised at trial, and the final order of the trial court[7] contains not even the most remote reference to any constitutional issue.[8]

Nor were any constitutional issues presented to the Supreme Court of Virginia for consideration. Petitioner's Assignments of Error and Questions on Appeal from his Petition for Appeal to the Supreme Court of Virginia are reproduced in the Appendix at 3a-5a for emphasis. Nowhere do the words "due process" or "equal protection" or similar terms appear. Indeed, the Fourteenth Amendment to the

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• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

[7] Appendix *infra* at 6a-8a.

[8] Petitioner has made no effort to comply with the requirements of Rule 23(1)(f) of this Court that

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage of the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the court. . . .

United States Constitution was not even *cited* in the Petition for Appeal.

Thus, the state courts had no opportunity to consider, much less to decide the case on the basis of the constitutional issues which now are raised in the petition for writ of certiorari.

This Court has long maintained that it "will not undertake to review what the court below did not decide," *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954), and that whatever the merits of a point, if it "was not made until the case reached this Court," it will not be considered. *United States* v. *New York Telephone Co.,* 326 U.S. 638, 650 n.18 (1946).

The following quotation from *Lynch* v. *New York,* 293 U.S. 52 (1934) sets forth succinctly the reason why jurisdiction does not lie in the instant case:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. 293 U.S. at 54.

Equally fundamental is the principle that this Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945). The decisions of the state courts which Petitioner asks this Court to review are grounded exclusively on state legislation enabling local jurisdictions to control nui-

sances and to enact zoning regulations,[9] and on county legislation implementing the state enabling legislation.[10]

This case involves the most mundane of local zoning matters, and until the petition for writ of certiorari was filed the case contained no hint of a federal question. There is no federal question properly before this Court, and certiorari should be denied.

CONCLUSION

Petitioner asks the Court to review federal constitutional issues which are raised for the first time in the petition for writ of certiorari. The constitutional issues were not presented to the state courts from which the petition is taken, and thus were not considered by them in reaching their decisions. Furthermore, the decisions of the state courts are founded exclusively on adequate and independent state grounds.

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[9] *E.g., Va. Code* §§ 15.1-11.1, 14(5), 491(d), 499, 522, 867, 905; §§ 21-89.6, 89.11. Appendix *infra* at 13a-15a.

[10] *E.g., Fairfax County Code* § 1A-9; § 17-7.2; §§ 30-1.8.18, 1.8.18.1, 2.2.1, 2.2.2, 3.2.1.4.1, Appendix *infra* at 15a-20a.

Accordingly, respondents submit that this Court is without jurisdiction to review the decisions below, and that the petition for writ of certiorari should be denied.

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Counsel of Record
for Respondents.

December 29, 1977

APPENDIX

APPENDIX

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Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of September, 1977.

PAUL LEE SWEENY, Executor and Trustee, etc., *Appellant*,

against Record No. 770305

GILBERT R. KNOWLTON, et al., *Appellees*.

Upon a Petition for Rehearing

On mature consideration of the petition of the appellant to set aside the decree entered herein on the 23rd day of June, 1977, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

H. G. TURNER, *Clerk*

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 23rd day of June, 1977.

The petition of Paul Lee Sweeney, executor and trustee under the will of Gervais Joseph Sewell, deceased, for an appeal from and supersedeas to a decree entered by the Circuit Court of Fairfax County on the 5th day of November, 1976, in a certain chancery cause then therein depending, wherein Gilbert R. Knowlton and another were plaintiffs and Gervais Joseph Sewell was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the said circuit court.

Record No. 770305

A Copy,

Teste:

HOWARD G. TURNER, *Clerk*

By: ALLEN L. LUCY,

Deputy Clerk

Petitioner's Assignments of Error and Questions On Appeal In Petition For Appeal To the Supreme Court of Virginia

ASSIGNMENTS OF ERROR

Pursuant to Rule 5:21 of the Rules of this Court, the defendant assigns the following errors in the Trial Court:

I

The Trial Court erred in holding that the defendant was a non-resident of Virginia at the time process to commence this suit was served on the Secretary of the Commonwealth, and in overruling defendant's Motion to Quash such service and To Dismiss this suit, filed by defendant upon special appearance.

II

The Trial Court erred in refusing to dismiss this suit at the close of complainants' evidence on the ground complainants did not serve notice of any alleged violations of the zoning ordinance nor give defendant a reasonable time within which to correct any such alleged violations, as complainant Knowlton was required to do by Section 30-14.1 of said zoning ordinance.

III

The Trial Court erred in refusing to include in its final judgment its announced findings that the evidence showed that defendant has the right to carry on his excavation and landscaping business from subject property as non-conforming uses which existed prior to the adoption of county zoning ordinances.

IV

The Trial Court erred in enjoining the sale or removal of topsoil from subject property, except where allowed by law.

V

The Trial Court erred in enjoining defendant from dumping or discharging on said property any substance of any type or description except those substances which are permitted by law to be discharged.

VI

The Trial Court erred in holding that defendant was operating a landfill on his property in violation of the county zoning ordinance, and that the same constituted a nuisance; and further erred in refusing to enter a declaratory judgment declaring defendant to be entitled to a landfill permit in accordance with the application and plans submitted by him requesting the same.

VII

The Trial Court erred in requiring defendant to implement the so-called "restoration" plan for defendant's land submitted by complainant county.

QUESTIONS ON APPEAL

The principal questions involved on appeal are:

1. Did the Trial Court err in holding that the defendant was a nonresident of Virginia so as to permit service of process to commence this suit to be made under the so-called "long arm" statute (Code Section 8-81.3), and in refusing to quash such service and to dismiss the instant suit.

2. Did the Trial Court err in refusing to dismiss this suit at the close of complainants' evidence which showed complainants failed to serve notice of any alleged violations of the County Zoning Ordinance on defendant or to give defendant a reasonable time to correct the same, prior to the institution of this suit, as required by the specific provisions of the said County Zoning Ordinance.

3. Did the Trial Court err in refusing to include in its Final Judgment herein its announced findings that the evidence in this case has shown that defendant has the right to carry on his excavation and landscaping business from subject property as non-conforming uses which existed prior to the adoption of county zoning ordinances.

4. Did the Trial Court err in enjoining the sale or removal of topsoil from subject property, except where allowed by law.

5. Did the Trial Court err in enjoining all dumping or discharging on said property of any substance of any type or description, except those substances which are permitted by law to be discharged.

6. Did the Trial Court err in holding that defendant was operating a landfill on his property in violation of the county zoning ordinance, and that the same constituted a nuisance, and in refusing to enter a declaratory judgment declaring defendant to be entitled to the landfill permit he applied for in accordance with the application and plans submitted by defendant requesting such permit.

7. Did the Trial Court err in requiring defendant to implement the so-called "restoration" plan for defendant's land submitted by the complainant county.

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GILBERT R. KNOWLTON, et al., *Complainants,*

v.

GERVAIS JOSEPH SEWELL, *Defendant*

In Chancery No. 48079

Final Order

THIS CAUSE came on to be heard the 7th, 12th, 13th and 19th days of April, the 7th and 21st days of May, the 25th day of June, and the 14th day of October, 1976, upon Complainants' Bills of Complaint and upon evidence presented by Complainants and Defendant, and was argued by counsel; and

IT APPEARING TO THE COURT that at the time of issuance by this Court of a temporary injunction by order dated December 18, 1975, and at the time of issuance by this Court of an order of abatement dated January 21, 1976, that a substance emanating from a leaf pile situated on real property owned by defendant Sewell and located at 2051 Great Falls Street in Fairfax County, Virginia, was polluting state waters, to wit, Burke Springs Branch, in violation of § 17-7 of the *Fairfax County Code* and of statutes of the Commonwealth of Virginia, and that said substance was causing an objectionable odor to individuals of ordinary sensibility, in violation of § 1A-9 of the *Fairfax County Code,* and that the condition and location of said substance was creating a nuisance; it is hereby

ADJUDGED, ORDERED and DECREED that the temporary injunction against said pollution, odor and nuisance entered in this cause by order of this Court on December 18, 1975, and continued in full force and effect *pendente lite* by orders of this Court of January 16, 1976, and February 11, 1976, be, and hereby is, made permanent; and

IT FURTHER APPEARING TO THE COURT that at the time of issuance by this Court of a temporary injunction by order dated January 16, 1976, that a landfill operation was being conducted on said real property owned by defendant Sewell, which real property is located in the RE-1 (residential, one-acre) zoning category, and that said landfill operation was in violation of §§ 30-2.2.1 and 30-2.2.2 of the *Zoning Ordinance of Fairfax County* and of *Va. Code Ann.* §§ 21-89.6 and 21-89.11, and constituted a nuisance; it is hereby

FURTHER ADJUDGED, ORDERED and DECREED that the temporary injunction against said landfill operation, and against the dumping or discharge on said real property of any substance of any type or description, except those substances which are permitted by law to be discharged, entered in this cause by order of this Court on January 16, 1976, and continued in full force and effect *pendente lite* by order of this Court of February 11, 1976, be, and hereby is, made permanent, and the defendant is directed to implement by December 14, 1976, the restoration plan set forth in the document accepted by the Court at the October 14 hearing as Complainants' Exhibit Number 1 and adopted by the Court as the restoration plan for the said real property; and

IT FURTHER APPEARING TO THE COURT that the following junk vehicles are stored on said real property, in violation of §§ 30-2.2.1, 30-2.2.2, 30-1.8.18.1 and 30-3.2.1.4.1 of the *Zoning Ordinance of Fairfax County*: Autocar dump truck, no tags; dump truck, no motor, 1972 Virginia tags T307-370; White tractor, 1972 Virginia tags Y8-099; it is hereby

FURTHER ADJUDGED, ORDERED and DECREED that defendant Sewell be, and hereby is, permanently enjoined from storing junk vehicles on said real property, and the defendant is directed to remove, on or before December 5, 1976, the junk vehicles listed in the preceding paragraph,

and if ownership or control be retained to transport them to a location where they lawfully may be situated; and it is

FURTHER ADJUDGED, ORDERED and DECREED that the order of this Court of May 7, 1976, permanently enjoining sale or removal of topsoil from said real property owned by defendant Sewell, except where allowed by law, be, and hereby is, incorporated herein by reference; and it is

FURTHER ADJUDGED, ORDERED and DECREED that this Court will retain jurisdiction of this cause for purposes of directing and supervising execution of appropriate remedial action and abatement by the Defendant. This decree is final. Defendant has leave to file written objection within 7 days.

ENTERED this 5th day of November, 1976.

WILLIAM G. PLUMMER
Circuit Court Judge

We Ask For This:

FREDERIC LEE RUCK
County Attorney

By: DAVID T. STITT
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4100 Chain Bridge Road
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Seen and Excepted to:

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Counsel for Defendant

A Copy Teste:

JAMES E. HOOFNAGLE, *Clerk*

By: TERESA M. RUSH, *Deputy Clerk*

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GILBERT R. KNOWLTON, et al., *Complainants*,

v.

GERVAIS JOSEPH SEWELL, *Defendant*

IN CHANCERY No. 48079

Order

Pursuant to Rule 5:11 of the Rules of the Supreme Court of Virginia, this Court hereby certifies to the Supreme Court of Virginia that the transcript of the proceedings in the above-captioned cause is incomplete in the following respects:

1. No transcription of the proceedings on January 12, 1976, is included. On that date testimony was taken, service of process was discussed, a temporary injunction was continued in effect, and the proceedings were recorded by a court reporter.

2. No transcription of the proceedings on January 16, 1976, is included. On that date testimony was taken, orders granting a temporary injunction against dumping and directing abatement of pollution were issued, and the proceedings were recorded by a court reporter.

3. No transcription of the proceedings on March 1, 1976, is included. On that date testimony was taken, an order regarding abatement of pollution was issued, and the proceedings were recorded by a court reporter.

4. No transcription of the proceedings on April 7, 1976, the first day of trial, is included. Witnesses called by complainants who testified included the following: Gilbert R. Knowlton, Judy Staats, Sharon Lemen, James J. Ross, Jr., Richard H. Schmidt, Fred D. Keidaish, Rosanne Rodilosso, Cindy Karickhoff, George Hardy, Louise Wood,

Mark Alger, Kathy Braaten, Muriel Brasche, and John Click. Documentary evidence was introduced by complainants, and the proceedings were recorded by a court reporter.

5. Only a partial transcription of the proceedings on April 12, 1976, the second day of trial, is included. No transcription is included of the testimony of the following witnesses called by the complainants: Veril H. Tielkemeier, Thomas Blackwell, Paris T. Houston, and Lennart Koneczny. No transcription is included of the testimony of Ronald Fortney, a witness called by the defendant. Incomplete transcriptions are included of the testimony of Claude Kennedy, a witness called by the complainants, and of Wallace S. Covington, a witness called by the defendant. Those transcriptions are incomplete in three respects: first, grounds for and argument and rulings on objections were omitted from the transcriptions at the instance of counsel for the defendant (*e.g.*, pp. 6, 10, 19, 20, 21, 28, 29, 32 and 34 of the April 12 transcription); second, material has been omitted from the transcription at the instance of counsel for the defendant, with the following notation substituted therefor: "(Discussion. Thereupon, discussion was held between Court and Counsel, which was reported by reporter but not transcribed, as requested by Counsel for the defendant) (*e.g.*, pp. 18 and 27 of the April 12 transcription); and third, material has been omitted from the transcription at the instance of counsel for the defendant and the symbol "• • • •" substituted therefor (*e.g.*, p. 8 of the April 12 transcription). Furthermore, documentary evidence was introduced by complainants and by defendant, and the entire proceedings were recorded by a court reporter.

6. Only a partial transcription of the proceedings of April 13, 1976, the third day of trial, is included. No transcription is included of the testimony of the following witnesses called by the defendant: William T. Reid, Paul

J. Schlagar, Eugene R. Wood, Jr., John D. Parker, Robert G. Lowe, Edward J. O'Brien, John P. Stoddard, Donald Strickhouser, Sylvia Bosco and Charles Costello. Incomplete transcriptions are included of the testimony of the following witnesses called by the defendant: John Yaremchuk, Robert W. Johnson, Jr., Gilbert R. Knowlton, William W. Smith, Jr., Guy Grimes, George Korte and Gervais Joseph Sewell. Those transcriptions are incomplete in the same three respects described in preceding paragraph (5): grounds for, argument and rulings on objections are omitted (*e.g.*, pp. 4, 7, 13, 18, 39, 44, 45, 46, 47, 48, 50, 52, 62 and 64 of the April 13 transcription); notations reflect deletion of material "as requested by Counsel for the defendant" (*e.g.*, pp. 5, 52 and 58 of the April 13 transcription); and the "• • • •" symbol for deleted material appears without further explanation (*e.g.*, pp. 22, 52, 55 and 58 as of the April 13 transcription).

7. Only a partial transcription of the proceedings on April 19, 1976, the fourth and final day of trial, is included. No transcription is included of the testimony of the following witnesses called by the defendant: Oscar E. Kiessling, Cora Sewell, Preston Sewell, and the defendant Gervais J. Sewell. No transcription is included of the testimony of the following witnesses called in rebuttal by the complainants: Robert Frase, Gilbert R. Knowlton, and John A. K. Donovan. An incomplete transcription is included of the testimony of John Lay, a witness called in rebuttal by complainants. The transcript of today is made a part of the record.

ENTERED this 14th day of January, 1977.

WILLIAM G. PLUMMER
Circuit Court Judge

We Ask For This:

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Counsel for Complainants

Seen and Excepted to:

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Paul Lee Sweeny,
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Arlington, Virginia 22201

Counsel for Defendant

A Copy Teste:

JAMES E. HOOFNAGLE, *Clerk*

By: EDNA L. PONCAR, *Deputy Clerk*

Code of Virginia

§ 15.1-11.1. AUTHORITY TO RESTRICT KEEPING OF INOPERATIVE MOTOR VEHICLES, ETC., ON RESIDENTIAL OR COMMERCIAL PROPERTY; REMOVAL OF SUCH VEHICLES.—(a) The governing body of any county, city or town may, by ordinance, provide that it shall be unlawful for any person, firm or corporation to keep, except within a fully enclosed building or structure, on any property zoned for residential or commercial or agricultural purposes any motor vehicle, trailer or semitrailer . . . whose condition is such that it is economically impractical to make them operative . . . .

• • •

§ 15.1-14. STREETS, PARKING FACILITIES, PUBLIC GROUNDS AND BUILDINGS; MARKETS; NUISANCES; POWDER AND COMBUSTIBLES; CEMETERIES. Every city and town may:

• • •

(5) Prevent injury or annoyance from anything dangerous, offensive or unhealthy and cause any nuisance to be abated;

• • •

§ 15.1-491. PERMITTED PROVISIONS IN ORDINANCES; AMENDMENTS.—A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

• • •

(d) For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the county or municipality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, including the ordering in writing of the remedying of any condition found in violation of the ordinance, and the bringing of legal action to insure compliance with the

ordinance, including injunction, abatement, or other appropriate action or proceeding.

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§ 15.1-499. RESTRAINING, ETC., VIOLATIONS OF CHAPTER.—Any violation or attempted violation of this chapter [Public Utilities] or any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding.

§ 15.1-522. COUNTY BOARDS OF SUPERVISORS VESTED WITH POWERS AND AUTHORITY OF COUNCILS OF CITIES AND TOWNS; EXCEPTIONS.—The boards of supervisors of counties are hereby vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly passed in pursuance thereof . . .

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§ 15.1-867. ABATEMENT OR REMOVAL OF NUISANCES.—A municipal corporation may compel the abatement or removal of all nuisances . . . . If after such reasonable notice as the municipal corporation may prescribe the owner or owners, occupant or occupants of the property or premises affected by the provisions of this section shall fail to abate or obviate the condition or nuisance, the municipal corporation may do so and charge and collect the cost thereof from the owner or owners, occupant or occupants of the property affected in any manner provided by law for the collection of State or local taxes.

§ 15.1-905. INJUNCTIVE RELIEF AGAINST CONTINUING VIOLATION OF ORDINANCE.—A municipal corporation, in addition to the penalty imposed for the violation of any ordinance, may enjoin the continuing violation thereof by proceedings for an injuction brought in any court in the municipal corporation having jurisdiction to grant injunctive relief.

Erosion and Sediment Control Law

§ 21-89.6. REGULATED LAND-DISTURBING ACTIVITIES.—(a) Except as provided in subsections (e) and (f) of this section, no person may engage in any land-disturbing activity after the adoption of the conservation standards by the districts, counties, cities or towns until he has submitted to the district, county, city, or town an erosion and sediment control plan for such land-disturbing activity and such plan has been reviewed and approved by the plan-approving authority. Where land-disturbing activities involve lands under the jurisdiction of more than one local control program an erosion and sediment control plan may, at the option of the applicant, be submitted to the Commission for review and approval rather than submission to each jurisdiction concerned.

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§ 21-89.11. PENALTIES, INJUNCTIONS AND OTHER LEGAL ACTIONS.—(a) A violation under §§ 21-89.6 . . . of this article shall be deemed a misdemeanor and upon conviction shall be subject to a fine not exceeding one thousand dollars or thirty days imprisonment for each violation or both.

(b) The appropriate permit-issuing authority, a district, a county, city, or town operating its own program, or the Commission may apply to the court of record in the jurisdiction wherein the land lies, or to the Circuit Court of the city of Richmond should the lands lie in more than one jurisdiction, for injunctive relief to enjoin a violation or a threatened violation under §§ 21-89.6 . . . without the necessity of showing that there does not exist an adequate remedy at law.

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Fairfax County Code

§ 1A-9. ODOR.

a. Scope.

This section shall apply to all operations that produce odorous emissions.

b. Prohibition of objectionable odor.

(1) No person shall cause, suffer, allow or permit any source to discharge air contaminants which cause an objectionable odor to individuals of ordinary sensibility without employing adequate measures for the control of odorous emissions, as may be approved by the Director.

c. Determination of violation.

(1) Determination of objectionable odor will be made after a thorough review of all data and evidence pertaining to the case has been made by the Director.

(2) If desired a person or persons found to be in violation of this section may, upon notice to the Fairfax County Air Pollution Control Board, apply for an exception to the Director's ruling. The Board's investigation may include the Director's data and evidence, the use of an odor panel, and/or other methods deemed necessary by the Board. The Board, after a public hearing, may uphold or vacate the Director's ruling.

(d) Exception.

This section is not intended to be applied to accidental or other infrequent emissions of odors.

§ 17-7.2. Erosion and sedimentation control.

For the purpose of alleviating harmful and/or damaging effects of on-site erosion and siltation on neighboring downhill and/or down-stream properties during and after development, adequate controls of erosion and sedimentation of both a temporary and permanent nature shall

be provided by the property owner during all phases of any clearing, filling, grading, construction or other activity involving the disturbance of natural terrain or vegetative ground cover. Plans and specifications for such controls, in such detail as to the director seems appropriate, taking into account the magnitude and extent of the proposed activity, shall be submitted to and approved by the director prior to the commencement of any such activity; provided that the director may require additional or revised measures from time to time in the event originally approved measures prove to be inadequate.

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It shall be unlawful to clear, fill, grade or engage in other activity which will disturb natural terrain or vegetative ground cover upon any property without having first secured the approval of the director of plans and specifications for erosion and sedimentation control, and it shall further be unlawful to fail or neglect to conform to such plans and specifications or approved revisions or additions, in conjunction with any such clearing, filling, grading or other activity.

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Zoning Ordinance

§ 30-1.8.18. Junk Yard.

The use of any space, whether inside or outside a building, for the storage, keeping or abandoment of junk, including scrap metals or other scrap materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof; provided, that this definition shall not apply to any such use conducted solely as an accessory use and occupying not more than one hundred square feet of the area of any lot other than any portion of that half thereof that adjoins any street.

§ 30-1.8.18.1. JUNK VEHICLE.

Any motor vehicle, trailer, or semi-trailer which is inoperable and which, by virtue of its condition, cannot be economically feasibly restored to operable condition, provided that such vehicle, trailer, or semi-trailer shall be presumed to be a junk vehicle if no license plates are displayed or if the license plates displayed have been invalid for more than sixty days.

§ 30.2.2.1 GENERAL EFFECT.

No building shall hereafter be erected and no existing building shall be moved, altered, added to or enlarged, nor shall any land or building be used, designed or arranged to be used for any purpose other than is included among the uses listed in the following schedule as permitted in the district in which such building or land is located, nor in any manner contrary to any other requirements specified in this article.

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The regulations listed in said schedule for each district are hereby adopted and prescribed for each district and shall be deemed to be the minimum requirements in every instance of their application subject to the provisions of other sections of this chapter.

§ 30-2.2.2. ONE-FAMILY RESIDENTIAL 2 ACRES. (RE-2) DISTRICT.

Column 1. Uses Permitted By Right:

1. Accessory buildings and uses as specified....
2. All agricultural uses.
3. Automobile parking as specified....
4. Home occupations.

• • •

5. One-family dwellings.

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9. Soil removal but only as follows:

   a. Removal from an R district of sod and soil to a depth of not more than eighteen inches and over an area not exceeding 5,000 square feet; or

   b. Removal or excavation necessary for construction when in accordance with an approved site plan or approved plans and profiles for a subdivision when such approval has been obtained in accord with the provisions of this Code.

   c. Grading of land in accord with a grading plan approved by the director, which grading plan shall provide for even finished grades which meet adjacent properties' grades and do not substantially alter natural drainage, and which plans include siltation and erosion control measures conforming with section 17-7a of this Code.

   Any other grading, excavating, mining and/or burrowing of land not listed above shall be permitted only in accordance with the provisions of section 30-7.2.1 of this chapter.

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Column 2. Special Permit Uses:

The uses comprised within Groups II, III, IV, V, VI, VII, VIII, IX and those Group X uses permitted in R districts as set forth in Article VII of this Chapter may be allowed under Special Use Permits.

§ 30-2.2.2. ONE-FAMILY RESIDENTIAL 1 ACRE. (RE-1) DISTRICT.

Column 1. Uses Permitted By Right:

Same as specified for RE-2.

Column 2. Special Permit Uses:

Same as specified for RE-2.

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§ 30-3.2.1.4.1 It shall be unlawful for the owner of any property to place or store, or permit to be placed or stored, except in a fully enclosed building, upon property lying in an R district in his ownership, a junk vehicle as defined in section 30-1.8.18.1 of this Chapter.